

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 1, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP1545-CR**

**Cir. Ct. No. 2012CF888**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SCOTT J. KOCIAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Brown County:  
TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Scott Kocian, pro se, appeals an order denying his WIS. STAT. § 974.06 (2015-16)<sup>1</sup> motion for sentence modification. As explained

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

below, Kocian has forfeited all but two of the arguments raised on appeal. We reject the arguments not otherwise forfeited and affirm the order.

### **BACKGROUND**

¶2 The State charged Kocian with one count of first-degree sexual assault of a ten-year-old child, H.S. Pursuant to a plea agreement, Kocian pleaded guilty to an amended charge of second-degree sexual assault of a child. In July 2013, the circuit court sentenced Kocian to four years' initial confinement and ten years' extended supervision. Kocian did not timely pursue a direct appeal. *See* WIS. STAT. RULE 809.30.

¶3 In March 2015, Kocian filed the underlying WIS. STAT. § 974.06 motion for sentence modification, in which he claimed: (1) he was sentenced on the basis of inaccurate information provided by H.S. and her mother regarding the extent of H.S.'s injuries; (2) the sentencing court was biased against him; and (3) he was denied the effective assistance of trial counsel. Specifically, Kocian asserted his trial counsel was ineffective: by overlooking both the possibility of a secondary transfer of DNA, and the possibility of a urinary tract infection as an alternative explanation for H.S.'s painful urination; and by failing to challenge the credibility of H.S.'s statements, and the victim impact statement H.S.'s mother completed. Kocian also claimed his progress in prison programs and the possibility that H.S. suffered from a urinary tract infection constituted new factors justifying sentence modification. The circuit court denied the motion without a hearing, and this appeal follows.

## DISCUSSION

¶4 All but two of Kocian’s arguments are raised for the first time on appeal.<sup>2</sup> In fact, Kocian concedes: “In this instant appeal, defendant proffers what amounts to a [WIS. STAT.] § 974.06(4) Supplemental Motion.” Generally, this court will not address issues for the first time on appeal. *See State v. Brown*, 96 Wis. 2d 258, 291 N.W.2d 538 (1980). The reason for this general rule is to give circuit courts the opportunity to correct errors, thus avoiding appeals. *See Herkert v. Stauber*, 106 Wis. 2d 545, 560, 317 N.W.2d 834 (1982). Given the issues raised, we see no reason in this case to disregard this rule.

¶5 For the first time on appeal, Kocian challenges the validity of his plea based upon claims he was denied the effective assistance of trial counsel.<sup>3</sup> Kocian alleges his counsel was ineffective by failing to disclose discovery material to Kocian before the plea hearing and by lying to Kocian about the strength of the State’s case in order to convince Kocian to plead guilty. Resolution of Kocian’s claims of plea infirmity would require fact-finding because the State does not concede the factual assertions underlying those claims. *See Panama v. Hepp*, 2008 WI App 146, ¶22, 314 Wis. 2d 112, 758 N.W.2d 806 (per curiam) (noting this court can never grant relief on ineffective assistance of

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<sup>2</sup> Any issues from Kocian’s sentence modification motion that he did not raise on appeal are deemed abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

<sup>3</sup> Although Kocian’s sentence modification motion challenged the effectiveness of his trial counsel, he did not claim that the ineffectiveness of counsel warranted plea withdrawal. Kocian has therefore forfeited his present challenge to the validity of his plea by failing to raise it below. *See Townsend v. Massey*, 2011 WI App 160, ¶27, 338 Wis. 2d 114, 808 N.W.2d 155 (holding an argument is forfeited if not raised before circuit court even if it is related to an argument that was raised before circuit court).

counsel claim without first remanding for evidentiary hearing unless State concedes error). Given this factual dispute, we are unwilling to overlook the forfeiture of Kocian's challenge to the validity of his plea.

¶6 Kocian also intimates for the first time on appeal that the prosecutor committed "misconduct" at the sentencing hearing by failing to set forth sufficient facts to prove Kocian's guilt beyond a reasonable doubt. As the State properly notes, a prosecutor is not required to prove a defendant's guilt at sentencing. *See State v. J.E.B.*, 161 Wis. 2d 655, 670, 469 N.W.2d 192 (Ct. App. 1991) (sentencing hearing is not a trial with an attendant burden of proof). Generously construing Kocian's argument as a challenge to the factual basis supporting Kocian's guilty plea, the State does not concede the facts underlying Kocian's claim; therefore, we will not overlook Kocian's forfeiture of this claim. Moreover, Kocian failed to ensure that a transcript of the plea hearing was included in the appellate record. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'" *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted).

¶7 Kocian also claims the sentencing court erroneously exercised its discretion by giving undue consideration to what Kocian characterizes as "irrelevant" information regarding Kocian's alcohol addiction. Again, Kocian has forfeited this claim by failing to raise his argument below. However, even on its merits, the argument fails. Sentencing lies within the circuit court's discretion. *See State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). The sentence imposed should be the minimum amount of confinement that is consistent with three primary sentencing factors: (1) the gravity of the offense; (2) the character

of the defendant; and (3) the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶23, 59-61, 270 Wis. 2d 535, 678 N.W.2d 197. The weight to be given each of the primary factors is within the discretion of the sentencing court, and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶8 Here, the record shows that in detailing its consideration of proper sentencing factors, including the defendant’s character, the circuit court noted Kocian’s history of alcohol use. The court rejected Kocian’s attempts to blame alcohol for his conduct, noting “people get drunk; they unfortunately sometimes drive but they don’t rape 10 year old girls.” Kocian’s claim that the circuit court erroneously exercised its sentencing discretion by considering “irrelevant” factors is not supported by the record.

¶9 For the first time on appeal, Kocian also challenges the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment, claiming the evaluation was unconstitutional because he was unable to contest its scientific accuracy and because it took his gender into account. In addition to forfeiting this claim, Kocian has inadequately developed his argument on appeal. Therefore, we need not address it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may decline to review issues inadequately briefed). Moreover, the circuit court properly utilized COMPAS consistent with our supreme court’s decision in *State v. Loomis*, 2016 WI 68, ¶¶99, 371 Wis. 2d 235, 881 N.W.2d 749. The record shows COMPAS was not “determinative” of the sentence imposed. It merely reinforced the circuit court’s assessment of other, independent factors.

¶10 Finally, Kocian contends the sentencing court relied on inaccurate information at sentencing. A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. *Id.* A defendant who moves for resentencing on the ground that the circuit court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate and that the court actually relied on the inaccurate information. *Id.*, ¶31. “Whether the court ‘actually relied’ on the incorrect information at sentencing was based upon whether the court gave ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Id.*, ¶14 (quoting *Welch v. Lane*, 738 F.2d 863, 866 (7th Cir. 1984)).

¶11 First, Kocian suggests the sentencing court relied on a remark by H.S.’s mother in the victim impact statement that H.S. was so severely injured by the sexual assault that she may never be able to have children. At the sentencing hearing, defense counsel challenged this statement, contending there was no evidence to support the remark. In its decision denying Kocian’s sentence modification motion, the circuit court recounted that “[n]o where in the sentencing transcript does the [sentencing court] rely on the victim impact statement.” Although the court read the victim impact statement, the court did not discuss it when imposing sentence. Because the court did not give explicit attention to the disputed remark, Kocian failed to prove the circuit court actually relied on the remark.

¶12 Second, Kocian contends the sentencing court relied on incredible statements H.S. made to police regarding the approximate time of day when

Kocian assaulted her as well as her statement that Kocian's girlfriend came home after the assault and found Kocian naked. Kocian has not proven these statements were inaccurate. Even assuming their inaccuracy, Kocian failed to prove the sentencing court relied on them, as they were not mentioned during the sentencing hearing. Because Kocian fails to establish that the alleged misinformation was inaccurate or that the sentencing court relied on it, the circuit court properly denied his "sentence modification" motion.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

